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Hormat Mulia Holdings Sdn Bhd v Kerajaan Malaysia & Anor

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HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 21NCVC-59–07 OF 2016
DARRYL GOON JC
20 FEBRUARY 2019

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Tort — Defamation — Winding-up petition — First defendant filed and advertised winding-up petition against plaintiff — Whether advertisements defamatory — Whether defence of absolute privilege available to defendant

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Tort — Negligence — Duty of care — Winding-up petition — First defendant filed and advertised winding-up petition against plaintiff — Whether first defendant negligent in filing and advertising petition — Whether there was duty of care owed by first defendant to plaintiff — Whether plaintiff suffered any damage — Whether plaintiff's claim against defendants in negligence made out

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This was an action brought by the plaintiff against the defendants in the tort of negligence and in defamation. The alleged tortious conduct was in relation to a winding-up petition that was presented by the first defendant against the plaintiff. The first defendant filed an action against the plaintiff in the Sessions Court in Johor Bahru for a sum of RM35,271.62 ('sessions court suit'). A

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judgment in default for the sum claimed was entered against the plaintiff in the sessions court suit. Subsequent to the judgment in default being entered, the plaintiff, through its tax agent Euro Asia, made a proposal to settle the judgment debt by way of 12 instalment payments. The plaintiff's proposal was

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accepted by the first defendant. Following this, the plaintiff started making the instalment payments agreed upon. After several payments were made and accepted by the first defendant, the first defendant issued Winding-up Petition No 28NCC-72–04 of 2015 ('petition') against the plaintiff in the Johor Bahru High Court based on the judgment in default in the sessions court suit. In

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accordance with the then Companies Act 1965 and the applicable procedure under the Companies (Winding-up) Rules 1972, the petition was advertised in two local newspapers and *gazetted*. It was not disputed that the petition was presented by mistake and, so too, the advertising and *gazetting* of the petition. When discovered, the first defendant wrote to the plaintiff to apologise for the

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mistake. The plaintiff was also informed that the petition would be, and it was subsequently, withdrawn. It was upon these core material facts that the causes of action in negligence and defamation in this suit were based.

Held, dismissing the plaintiff's action with costs:

(1) There existed no duty of care owed by the first defendant to the plaintiff such as could afford the plaintiff a cause of action in negligence upon the bases pleaded. The reasons given in *Business Computers International Ltd v Registrar of Companies and others* [1987] 3 All ER 465 did not only apply to the conduct of pending legal proceedings between litigants, but also to the commencement of legal proceedings as in this case. Accordingly, the first defendant did not owe the plaintiff any duty of care. In addition, the plaintiff had also not proven that it had suffered any damage by reason of the petition being presented or the advertisements complained of. There was simply nothing to show that the alleged decline in its income was due to, or caused by, the advertisements. Hence, the plaintiff's claim against the defendants in negligence was not made out (see paras 23–24, 28–29 & 31).

(2) Having regard to the wording of the advertisements, the court was however not persuaded that the advertisements in anyway lowered the plaintiff in the estimation of right thinking members of the public or exposes the plaintiff to hatred, ridicule or contempt or would cause it to be shunned or avoided. The advertisements, required under the Companies Act 1965 and the applicable procedure under the Companies (Winding-up) Rules 1972, clearly fell within the ambit of the second category from the case of *Lincoln v Daniels* [1962] 1 QB 237 as documents brought into existence for the purpose of the proceedings, starting from the petition which instituted the winding-up proceedings. Having regard to the ratio decidendi of the case of *Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd* [2009] 5 MLJ 754, the first defendant's advertisement of the petition was therefore upon an occasion of absolute privilege. Accordingly, the plaintiff's action in defamation must also fail (see paras 34 & 38–39).

[Bahasa Malaysia summary

Ini adalah tindakan yang dibawa oleh plaintif terhadap defendan dalam tort kecuaian dan fitnah. Tingkah laku tort yang didakwa adalah berkaitan dengan petisyen penggulungan yang disampaikan oleh defendan pertama terhadap plaintif. Defendan pertama memfailkan tindakan terhadap plaintif di Mahkamah Sesyen Johor Bahru dengan jumlah RM35,271.62 ('guaman mahkamah sesyen'). Penghakiman ingkar bagi jumlah yang dituntut telah dimasukkan ke atas plaintif dalam guaman mahkamah sesyen. Berikutan penghakiman ingkar yang disampaikan, plaintif, melalui ejen cukainya Euro Asia, membuat cadangan untuk menyelesaikan hutang penghakiman melalui 12 bayaran ansuran. Cadangan plaintif telah diterima oleh defendan pertama. Berikutan itu, plaintif mula membuat pembayaran ansuran yang dipersetujui. Selepas beberapa bayaran telah dibuat dan diterima oleh defendan pertama, defendan pertama mengeluarkan Petisyen Penggulungan No 28NCC-72–04 Tahun 2015 ('petisyen') terhadap plaintif di Mahkamah Tinggi Johor Bahru

berdasarkan penghakiman ingkar dalam guaman mahkamah sesyen. Selaras dengan Akta Syarikat 1965 dan prosedur yang dikenakan di bawah Kaedah-Kaedah Syarikat (Penggulungan) 1972, petisyen itu diiklankan dalam dua akhbar tempatan dan *diwartakan*. Ia tidak dipertikaikan bahawa petisyen itu dikemukakan secara tidak sengaja dan, begitu juga, pengiklanan dan *pewartaan* petisyen itu. Apabila diketahui, defendan pertama menulis kepada plaintif untuk meminta maaf atas kesilapan itu. Plaintif juga dimaklumkan bahawa petisyen itu akan, dan selepas itu, ditarik balik. Ia adalah berdasarkan fakta-fakta material teras tersebut bahawa kausa tindakan dalam kecuaian dan fitnah dalam guaman ini adalah didasarkan.

Diputuskan, menolak tindakan plaintif dengan kos:

(1) Tidak ada kewajipan berjaga-jaga yang perlu diberi oleh defendan pertama kepada plaintif seperti yang dapat membawa plaintif sebagai kausa tindakan dalam kecuaian terhadap asas tersebut. Sebab-sebab yang diberikan di dalam *Business Computers International Ltd v Registrar of Companies and others* [1987] 3 All ER 465 tidak hanya terpakai untuk membawa prosiding undang-undang yang belum selesai antara litigan, tetapi juga kepada permulaan prosiding undang-undang seperti dalam kes ini. Oleh itu, defendan pertama tidak berhutang dengan plaintif apa-apa kewajipan berjaga-jaga. Di samping itu, plaintif juga tidak membuktikan bahawa ia telah mengalami apa-apa ganti rugi disebabkan petisyen yang dikemukakan atau iklan yang diadukan. Tidak terdapat apa-apa untuk menunjukkan bahawa penurunan yang dikatakan dalam pendapatannya akibat, atau disebabkan oleh, iklan-iklan tersebut. Oleh itu, tuntutan plaintif terhadap defendan dalam kecuaian tidak berjaya (lihat perenggan 23–24, 28–29 & 31).

(2) Berkenaan perkataan iklan tersebut, mahkamah walau bagaimanapun tidak diyakinkan bahawa iklan tersebut juga menurunkan plaintif dalam anggapan orang awam atau mendedahkan plaintif kepada kebencian, cemuhan atau penghinaan atau akan menyebabkannya dijauhi atau dielakkan. Iklan-iklan tersebut, yang dikehendaki di bawah Akta Syarikat 1965 dan prosedur yang terpakai di bawah Kaedah-kaedah Syarikat (Penggulungan) 1972, jelas jatuh dalam kategori kedua daripada kes *Lincoln v Daniels* [1962] 1 QB 237 sebagai dokumen yang dibawa masuk untuk tujuan prosiding, bermula daripada petisyen yang memulakan prosiding penggulungan. Memandangkan ratio decidendi daripada kes *Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd* [2009] 5 MLJ 754, iklan defendan pertama berkenaan petisyen itu adalah oleh itu atas keistimewaan mutlak. Oleh itu, tindakan plaintif dalam fitnah juga gagal (lihat perenggan 34 & 38–39).]

Cases referred to

Affin Bank Bhd v Sharifah Zohra Jabeen Syed Shah Miskin [2015] MLJU 2241; [2016] 4 CLJ 481, CA (refd)
Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 1 CLJ 585, CA (refd)
Arnica Corp Sdn Bhd v Robert Teo Keng Tuan & Anor and other appeals [2016] 2 MLJ 119 (refd)
Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 152, HC (refd)
Business Computers International Ltd v Registrar of Companies and others [1987] 3 All ER 465, Ch D (refd)
Caparo v Dickman [1990] 2 AC 605, HL (refd)
Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)
Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd [1985] AC 210, HL (refd)
Jain and another v Trent Strategic Health Authority [2009] 1 All ER 957, HL (refd)
Lim Guan Eng v Utusan Melayu (M) Bhd [2012] 2 MLJ 394; [2012] 2 CLJ 619, HC (refd)
Lincoln v Daniels [1962] 1 QB 237, CA (refd)
Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd [2002] 6 MLJ 507; [2002] 7 CLJ 81, HC (refd)
Radivojevic v LR Industries Ltd [1984] Lexis Citation 936, CA (refd)
Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee [2019] 3 MLJ 720, FC (refd)
Rondel v Worsley [1967] 3 All ER 993, HL (refd)
Savant-Asia Sdn Bhd v Sunway PMI-Pile Contruction Sdn Bhd [2009] 5 MLJ 754; [2008] 6 CLJ 681, FC (folld)
Syed Husin Ali v Sharikat Pencetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 (refd)
Tan Joon Kiang v AM Finance Bhd [2010] 1 MLJ 385; [2010] 2 CLJ 641 (refd)
Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal [2018] 5 MLJ 561; [2018] 6 CLJ 683, FC (refd)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393; [1995] 1 LNS 304, HC (refd)

Legislation referred to

Companies Act 1965
Companies (Winding-up) Rules 1972

Ismail bin Mohamed Arifin (Nur Aliah Selamat with him) (Ram Reza & Muhammad) for the plaintif.
Al Hammidallah Idros (Nor Asmah Adam and Muhammad Nabil Abdul Halim

A *with him) (Inland Revenue Board Malaysia) for the defendant.*

Darryl Goon JC:

INTRODUCTION

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[1] This is an action brought by the plaintiff against the defendants in the tort of negligence and in defamation. The alleged tortious conduct was in relation to a winding-up petition that was presented by the first defendant against the plaintiff.

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[2] The material facts in this case are relatively straight forward and were not much in dispute. On the 9 September 2010, the first defendant filed an action against the plaintiff in the Sessions Court in Johor Bahru. This was Summons No 51–90 of 2010 ('sessions court suit'). This sessions court suit was for a sum of RM35,271.62.

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[3] On the 11 October 2010, a judgment in default for the sum claimed was entered against the plaintiff in the sessions court suit. Subsequent to the judgment in default being entered, the plaintiff, through its tax agent Euro Asia, made a proposal to settle the judgment debt by way of 12 instalment payments. This proposal was set out in Euro Asia's letter of 12 December 2014, addressed to the first defendant. By its letter to the plaintiff of 20 January 2015, the plaintiff's proposal was accepted by the first defendant. Following this, the plaintiff started making the instalment payments agreed upon.

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[4] On the 5 April 2015, after several payments were made and accepted by the first defendant, the first defendant issued Winding-Up Petition No 28NCC-72–04 of 2015 ('petition') against the plaintiff in the Johor Bahru High Court based on the judgment in default in the sessions court suit. In accordance with the then Companies Act 1965 and the applicable procedure under the Companies (Winding-up) Rules 1972, the petition was advertised in two local newspapers and *gazetted*.

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[5] It was not disputed that the petition was presented by mistake and, so too, the advertising and *of the petition. When discovered, the first defendant wrote to the plaintiff on 29 April 2015 to apologise for the mistake. The plaintiff was also informed that the petition would be, and it was subsequently, withdrawn.*

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[6] It was upon these core material facts that the causes of action in negligence and defamation in this suit were based.

THE PLAINTIFF'S CLAIM IN NEGLIGENCE

[7] The plaintiff contended that the first defendant was negligent in filing the petition and in advertising it.

[8] It is axiomatic that the elements constituting the tort of negligence are the existence of a duty of care, a breach of that duty and damage suffered by reason of that breach which is not in law, too remote (see *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567 at p 577; [2003] 1 CLJ 585 at p 600 and *Arnica Corp Sdn Bhd v Robert Teo Keng Tuan & Anor and other appeals* [2016] 2 MLJ 119; [2016] 2 MLJ 119).

[9] Thus one fundamental element is whether there was a duty of care owed by the first defendant to the plaintiff. The defendants, in their defence, had denied that there existed any such duty of care.

[10] In *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal* [2018] 5 MLJ 561; [2018] 6 CLJ 683, the Federal Court addressed the issue of the applicable test for determining whether a duty of care exists. In delivering the judgment of the court, Jeffrey Tan FCJ stated as follows:

> *[33] The first matter that must be established to proceed with a claim based on the tort of negligence is that the defendant owed a duty of care to the plaintiff. 'The tort of negligence requires first of all that there be a duty of care on the part of the (defendant) not to do any act or omit to do any act the doing of which or the omission of which could foreseeably affect other persons resulting in damage or loss to such other persons'* (*Siew Yaw Jen v Majlis Perbandaran Kajang & Another Appeal* [2015] 4 MLJ 411; [2015] 5 CLJ 189 per Zaharah Ibrahim JCA, as she then was, delivering the judgment of the court). 'Tortious liability arises from a wrongful act where the common law imposes a duty to take reasonable care' (*Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* per Zainun Ali FCJ delivering the judgment of the court). Once a duty existed, the plaintiff must show that the defendant breached it.

Further on in his judgment, His Lordship stated as follows:

> [50] *Caparo*'s *'three-fold test' to determine a new situation duty of care, encompassed public policy concerns, probably, to limit 'a liability in an indeterminable amount for an indeterminable time to an indeterminable class'* (*Ultramares Corporation v Touche* 255 NY 170, 174, NE 441 (1931) per Cardozo CJ) if Lord Atkin's neighbour principle were applied without restriction. *In order for a duty of care to arise in negligence, (i) harm must be reasonably foreseeable as a result of the defendant's conduct (as established in Donoghue v Stevenson), (ii) the parties must be in a relationship of proximity, and (iii) it must be fair, just and reasonable to impose liability*.
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> [51] The three-fold test is clear enough. *But courts must yet resolve what is 'fair, just and reasonable' and what are the 'public policy' concerns that militate against the imposition of a duty of care. In Barrett v Enfield London Borough Council* [2001] 2 AC

550, *Lord Browne-Wilkinson explained that 'fair, just and reasonable' depends on the pros and cons of the imposition, or otherwise, of a duty of care*:

> In English law, *the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered*.

[52] '*Ultimately it comes down to judicial conception of desirable policy. The question of responsibility for negligence may be argued in an almost unlimited range of circumstances, and a court may take all kinds of consideration into account in deciding whether a duty ought to be owed*. However, this does not mean that the question is entirely at large, or that every new decision is no more than an *ad hoc* determination of policy' (*Charlesworth and Percy* (13th Ed), at 2–41). Core concerns of policy include (i) promoting automony *(sic)* — the law draws a distinction between positive acts and failures to do so; (ii) preventing indeterminable liability; (iii) protecting the vulnerable; and (iv) maintaining coherence in the legal system — a duty of care should fit coherently into an overall scheme of rights and responsibilities or, in other words, it should be consistent with other legal rules and principles (see *Charlesworth and Percy* 13th Ed at 2–42 to 2–45). (Emphasis added.)

[11] In the case of *Business Computers International Ltd v Registrar of Companies and others* [1987] 3 All ER 465 a similar set of circumstances arose for the determination of the court. In that case, the second defendant petitioned to wind-up the plaintiff on the ground that it had failed to pay a debt that was assigned to the second defendant. The petition was presented, duly advertised but served at the wrong address. An order for winding-up was then made. The plaintiff applied to set aside the order and claimed for damages against the second defendant. The winding-up order was set aside. The plaintiff also sought damages against the second defendant which included expenditure incurred in having to promote another trading name by reason of having to abandon its existing name and damages for loss of good will in its existing name. The plaintiff's claim was in negligence and the issue that the court was confronted with was whether the second defendant owed the plaintiff a duty of care.

[12] Scott J in his judgment in *Business Computers* at p 470 of the report, described the specific task before him as follows:

> The propriety of the plaintiff's negligence action against the second defendant depends, in my judgment, on the proposition that a person who institutes legal process owes a duty of care to the respondent or defendant in regard to service of the proceedings.

[13] In *Business Computers* Scott J applied the principles applicable in

English law and this was before the decision of the House of Lords in *Caparo v Dickman* [1990] 2 AC 605, referred to in *Bukit Kemas*. However, Scott J in *Business Computers* regarded the situation that presented before him as a novel one, that is to say that a duty of care in the situation before him had never been established, and proceeded on the basis stated by Lord Keith in *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210. At p 472 of the report in *Business Computers* Scott J stated as follows:

> The right approach is, I think, summarily expressed by Lord Keith's dictum in the *Peabody* case [1984] 3 All ER 529 at 534, [1985] AC 210 at 241 that, in determining whether or not a duty of care of particular scope was incumbent on a defendant it is material to take into consideration whether it is just and reasonable that it should be so.

[14] Lord Keith's dictum was also the subject of approbation in the *Caparo*, where Lord Jauncey of Tullichettle at pp 654–655, stated:

> Whether liability exists in any particular case will depend upon whether the maker of the statement owes a duty of care to the person who has suffered loss. In this connection I cannot do better than quote the words of Lord Keith of Kinkel in *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 at pp 240–241:
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> > The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case ... *So in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so.* (Emphasis added.)

[15] Thus the ingredient of 'just and reasonable' that featured prominently in the subsequent cases of *Caparo* and *Bukit Kemas*, was the basis of Scott J's decision in *Business Computer*s.

[16] In considering whether it was just and reasonable that a duty of a care be imposed in *Business Computers*, Scott J rationalised as follows at p 472 of the report:

> *Is it just and reasonable that a plaintiff should owe a duty of care to a defendant in regard to service of the originating process? I do not think that it is. The plaintiff and the defendant, the petitioner and the respondent, are antagonists. The plaintiff, or the petitioner, is seeking a legal remedy in an adversarial system*. The system stipulates the rules and requirements that must be observed by the two parties. The plaintiff must issue his process and must serve it on the defendant. If there is default in service the process may be struck out. If an order is obtained without the prescribed rules or regulations having been observed, the order may be discharged or set aside,

A sometimes by an application at first instance, sometimes on appeal. *The prosecution of the action or of the petition is subject throughout its career from institution to final judgment to judicial control*. Service of process is a step, and usually an essential step, in the prosecution. It must usually be proved before an order can be obtained against an absent defendant. *The proposition that a duty of care is owed by one litigant to another and can be superimposed on the checks and safeguards that the legal system itself provides is, to my mind, conceptually odd. The safeguards against ineffective service of process ought to be, and I think must be, found in the rules and procedures that govern litigation*. The rules and procedures require that, save on ex parte applications, proof of service be shown before an order is made against an absent party. If the proof of service is false, be it through negligence or design, an order may be made that should not have been made. *The injured party's remedy is to have the order set aside*. An action for damages cannot be based on the falsity of the proof of service. Nor, in my judgment, can the adequacy of the efforts made to effect service be subjected to a tortious duty of care. (Emphasis added.)

Scott J then concluded at p 473 of the report:

In my judgment, there is no duty of care owed by one litigant to another as to the manner in which the litigation is conducted, whether in regard to service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules and procedure that control the litigation and not in tort.

[17] In *Business Computers*, the issue was alleged negligence in the course of litigation. Is there any difference if the situation was one in relation to the bringing of an action or the filing of a winding-up petition as in the case at hand?

[18] Referring to the case of *Radivojevic v LR Industries Ltd* [1984] Lexis Citation 936 Transcript, cited by counsel, Scott J in *Business Computers* said that, 'It is implicit in the decision that the commencement of bankruptcy proceedings or the presentation of a winding-up petition cannot found an action in damages unless associated with malice'. Reference was also made to the following statement of Lord Pearce in *Rondel v Worsley* [1967] 3 All ER 993 at pp 1024–1025:

The legal process inevitably creates hardships and it is not always easy to see what is the right balance. In attempting to do so one must regard the interrelation of the various parts. *It is a hardship that a man who has done no wrong should be subjected by a plaintiff to a baseless charge, in meeting which he will incur large expense. The charge may be reported largely in the newspapers and injure his reputation.* ... But the basic hardship is inevitable and will always remain, namely, that any plaintiff can use the legal machine as a sounding board for untruthful allegations and cause harm, trouble and expense to an innocent defendant, and yet the law holds him (and the press who report the case) immune from paying damages for their untruth. *Yet to remove this immunity would create a great injury to justice. Without it, the honest*

litigant might not dare to bring an honest claim for fear that if he fails he might be sued for damages. (Emphasis added.)

[19] This passage was cited with approval by the Court of Appeal in *Affin Bank Bhd v Sharifah Zohra Jabeen Syed Shah Miskin* [2015] MLJU 2241; [2016] 4 CLJ 481 wherein the court speaking through Mary Lim J (as she then was), stated:

> [17] The court agrees that it is both implicit and not in the public interest if litigants such as the appellant are prohibited from bringing honest enforcement proceedings and claims before the court on the strength of a proper and valid judgment of the court.

[20] In *Affin Bank*, bankruptcy proceedings were brought against the plaintiff under a valid and existing judgment. Receiving and adjudicating orders were granted against the plaintiff but they were subsequently set aside because the respondent in that case was a social guarantor. When the bankruptcy proceedings were brought, they were predicated on a valid and enforceable judgment.

[21] The decision in *Business Computers* was also adopted and applied in the case of *Tan Joon Kiang v AM Finance Bhd* [2010] 1 MLJ 385; [2010] 2 CLJ 641 where bankruptcy proceedings were brought and succeeded against the plaintiff based upon a judgment in default which was subsequently set aside because it was an irregular judgment (see also the case of *Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd* [2002] 6 MLJ 507; [2002] 7 CLJ 81).

[22] In the case at hand, the error that was alleged to be negligent was the failure of the legal unit of the first defendant to realise that there was an agreed settlement agreement in place in respect of the judgment in default against the plaintiff. Evidence was led to the effect that the information of the settlement agreement was available in the first defendant's database to which its legal unit had access. The fact that there was a mistake on the part of the first defendant was not disputed. The judgment in default was never set aside and thus remained a valid and enforceable judgment. However, it was clearly subject to the settlement agreement that the parties had arrived at. Thus, the petition should not have been presented. As such, even if it is accepted that it was a negligent mistake that then led to the presentation of the petition, was there any duty of care owed by the first defendant?

[23] Having regard to the authorities referred to above, I am of the view that in the circumstances of this case, there existed no duty of care owed by the first defendant to the plaintiff such as could afford the plaintiff a cause of action in negligence upon the bases pleaded. It may well be argued that harm by reason

of the mistake was reasonably foreseeable. It may also be argued that there was proximity of relationship. However, to my mind what cannot be established is the third limb of the *Caparo* test.

[24] The reasons given by Scott J in *Business Computers* cited above as to why it is not just and reasonable for there to be a duty of care between litigants are very compelling. The reasons given by Scott J, in my view, do not only apply to the conduct of pending legal proceedings between litigants, but also to the commencement of legal proceedings as in the case at hand. If it were to be otherwise, the failure of every legal action may well give rise to a subsequent action in negligence.

[25] In *Jain and another v Trent Strategic Health Authority* [2009] 1 All ER 957, *Business Computers* and several other cases were cited with approval by the House of Lords. In *Jain*, a registration authority applied *ex parte* for the cancellation of the registration of the claimant's nursing home. The application was allowed and the order required immediate compliance. The claimant, not having any prior notice, had no opportunity to contest the enforced closure of its nursing home. Although subsequently the claimant was successful in its appeal to a registered homes tribunal, by that time, damage had already been done to its nursing home business and other assets owned. The claimant brought an action in negligence against the registration authority premised on the negligence of the authority in making the ex parte application to cancel the registration of its nursing home.

[26] The House of Lords held that the claimant's claim in negligence failed and one of the reasons given was that the registration authority did not owe the claimant any duty of care. In so holding Lord Scott stated as follows at p 971 of the report:

> [35] My Lords, ... where the *preparation for, or the commencement or conduct of, judicial proceedings before a court*, or of quasi-judicial proceedings before a tribunal such as a registered homes tribunal, has the potential to cause damage to a party to the proceedings, whether personal damage such as psychiatric injury or economic damage as in the present case, *a remedy for the damage cannot be obtained via the imposition on the opposing party of a common law duty of care*. The protection of parties to litigation from damage caused to them by the litigation or by orders made in the course of the litigation must depend upon the control of the court or tribunal in charge of it and the rules and procedures under which the litigation is conducted. (Emphasis added.)

[27] The decision of the House of Lords in *Jain*, is also the answer to the submission by learned counsel for the plaintiff that being a part of the government, the first defendant must necessarily owe a duty of care to the plaintiff as a taxpayer. In *Jain*, the defendant was a regulatory authority

exercising statutory powers. That, in itself, did not result in a duty of care being imposed upon the exercise of its powers to proceed against the defendant in that case. In *Jain*, as in the case at hand, the circumstances appertaining gave rise to what, in my view, was primarily a relationship between litigants.

[28] In this case, even if the petition was not withdrawn by the first defendant, surely the plaintiff would have been in a position to resist it. There was a settlement agreement in place. What this actually means is that the petition presented would not have been sustainable on its merits. This would put the petition in the same category as all other petitions presented that were dismissed because the respondents had valid defences. The danger of discouraging an honest claim for fear that should it fail, an action in negligence might be brought referred to by Lord Pearce *Rondel v Worsley* is a compelling reason why it would not be just and reasonable to impose a duty of care between litigants. To all litigants there is already in place the protection of the law and the procedures that govern the litigation process. Where there is malice or abuse in commencing legal proceedings, there also already exist actionable torts that would compensate for any damage caused. Accordingly, and for these reasons given, I hold that the first defendant did not owe the plaintiff any duty of care in the circumstances of this case such as would sustain an action in negligence.

[29] In addition, and without derogating from the foregoing, I would also add that in my view, the plaintiff had also not proven that it had suffered any damage by reason of the petition being presented or the advertisements complained of. There was simply nothing to show that the alleged decline in its income was due to, or caused by, the advertisements. It was alleged by the plaintiff that one of its clients ASTRO had slowly refused to do business with the plaintiff and finally stopped using the plaintiff's services altogether. However, apart from the say so by its director, Encik Mohd Farid Abdul Hamid ('PW1'), there was no evidence to support this. PW1 also alleged that financial hardship was caused, resulting in his properties being auctioned. However, and as the evidence adduced demonstrated quite plainly, these properties were PW1's personal properties and not those of the plaintiff.

[30] It must be borne in mind that the first defendant not only withdrew the petition; it also wrote a letter acknowledging that the petition was presented by mistake. If any explanation was required for any of the plaintiff's clients, it would have been easy enough to demonstrate that the petition was presented by mistake and withdrawn. Furthermore, if indeed it was the fact of the petition being presented as alleged, ASTRO or any other client would have stopped rather than taper its use of the plaintiff's services.

[31] In the circumstances and for the reasons given above, I hold that the

plaintiff's claim against the defendants in negligence was not made out.

THE PLAINTIFFS CLAIM IN DEFAMATION

[32] In addition to its claim in negligence, the plaintiff also mounted a claim in defamation based on the first defendant's advertisements of the petition pursuant to the applicable winding-up rules. The following was what was advertised in two local papers and *gazetted*:

IN THE HIGH COURT IN MALAYA AT JOHOR BAHRU COMPANIES [WINDING UP] NO 28NCC-72-04/2015

In The Matter Of Paragraph 218(1)(e) Of The Companies Act, 1965

And

In The Matter Hormat Mulia Holdings Sdn Bhd (620628-K)

BETWEEN

GOVERNMENT OF MALAYSIA

... PETITIONER

AND

HORMAT MULIA HOLDINGS SDN BHD (620628-K)

... RESPONDENT

ADVERTISEMENT OF PETITION

NOTICE is hereby given that a Petition for the Winding Up of the above named Company by the High Court was on the 05.04.2015 presented by the Government of Malaysia. And that the said Petition is directed to be heard before the Court sitting at Johor Bahru at 9.00 o'clock in the forenoon on Monday, 25 May 2016 and any creditor or contributory of the said Company desiring to support or oppose the making of an order on the said Petition may appear at the time of hearing by himself or his counsel for that purpose, and a copy of the petition will be furnished to any creditor or contributory of the said Company requiring the same by the undersigned on payment of the regulated charge for the same.

The petitioner's address is Inland Revenue Board Malaysia, Johor Bahru Branch, Prosecution Unit, No. 1 Jalan Padi Emas 1, Bandar Baru Uda, 81200 Johor Bahru, Johor.

The petitioner is Masuriati Binti Ahmad, Revenue Counsel, of Inland Revenue Board Malaysia lot and on behalf of the Government of Malaysia.

(MASURIATI BINTI AHMAD)

Revenue Counsel of Inland Revenue Board Malaysia, For and on behalf of the Government of Malaysia.

NOTE:

Any person who intends to appear on the hearing of the said Petition must serve on or send by post to the abovenamed notice in writing of his intention so to do. The Notice must stated the name and address of the person or, if a firm, the name and address of the firm and must be signed by the person or firm, or his or their solicitor (if any) and must be served or if posted must be sent by insufficient time to reach the abovenamed not later than 12.00 o'clock noon of the 24.05.2015 TA 27.04.2015 & 29.04.2015.

[33] The plaintiff alleged that the advertisements were defamatory of it. It was alleged that they meant that the plaintiff had failed to abide by the judgment in default in the sessions court suit and was a company that does not obey laws. It was also alleged that it meant that the plaintiff was financially unstable, unable to pay the judgment debt, had no principles, could not be trusted, was dishonest and unprofessional and the plaintiff was an insolvent company. These allegations were denied by the defendants.

[34] The fact that there was publication of the impugned words and that the publication referred to the plaintiff are indisputable. However, for the tort of defamation, the plaintiff has also to establish a third element that is to say, the publication was defamatory (see *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ 152 and *Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee* [2019] 3 MLJ 720). Having regard to the wording of the advertisements, I am however not persuaded that the advertisements in anyway lowers the plaintiff in the estimation of right thinking members of the public or exposes the plaintiff to hatred, ridicule or contempt or would cause it to be shunned or avoided (see *Syed Husin Ali v Sharikat Pencetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 at p 58, *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; [1995] 1 LNS 304, *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at p 374; [1999] 1 CLJ 461 at p 467; *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394; [2012] 2 CLJ 619).

[35] The only reference to the plaintiff was in the intitulement of the petition and nothing was mentioned of the subject matter or basis of the petition, although it has to be admitted that inferences may be drawn from the fact that the address of the petitioner was stated as the 'Inland Revenue Board Malaysia, Johor Bahru Branch, Prosecution Unit'. Nevertheless, all that was actually disclosed in the advertisements was the fact that a petition had been presented against the plaintiff and the date that it was to be heard. If such may be said to be defamatory, so too would every substituted service of a writ of summons by way of advertisement in the local newspapers. It would be clear to any reasonable man that whether the petition presented was maintainable was still left to be determined by the court. So too in the case of a writ of summons advertised by means of substituted service.

[36] However, what is more fundamental in this case is to be found in the decision of the Federal Court in *Savant-Asia Sdn Bhd v Sunway PMI-Pile Contruction Sdn Bhd* [2009] 5 MLJ 754; [2008] 6 CLJ 681. In *Savant-Asia*, a winding-up petition was presented against the plaintiff and it was advertised and published in *The Star* newspaper pursuant to the requirements of the then Companies Act 1965 and the Companies (Winding-Up) Rules 1972, despite the fact that the debt had been settled. The plaintiff then brought an action in defamation on the basis of the advertisement published after the debt had been settled. The issue before the Federal Court was whether the defence of absolute privilege was available to the defendant. The Federal Court held, relying on the dissenting judgment of Abdul Aziz JCA in the Court of Appeal below, that it was. As was stated by Arifin Zakaria FCJ in the decision of the Federal Court:

> [34] In the circumstances we would agree with Abdul Aziz JCA that 'to omit to advertise the petition would directly assist the appellants to surreptitiously keep the money exclusively to themselves, in the event that there were other creditors'. *Therefore, under the scheme of the Act and the WUR the advertisement is clearly mandatory and in the circumstances the advertisement was absolutely privileged. This would fall squarely under the second category of absolute privilege as mentioned by Devlin LJ in Lincoln v Daniels* [1962] 1 QB 237. (Emphasis added.)

[37] Although in *Savant-Asia Sdn Bhd* the settlement of the debt occurred after the presentation of the winding-up petition, and the court was particularly concerned that 'to omit to advertise the petition would directly assist the appellants to surreptitiously keep the money exclusively to themselves, in the event that there were other creditors', in my view, the decision of the Federal Court was not limited to those circumstances. It was based on a broader principle. Ultimately, the Federal Court relied on the second category of absolute privilege described by Devlin LJ in *Lincoln v Daniels* [1962] 1 QB 237, to arrive at its conclusion of absolute privilege. This, in my view, was an acceptance by the Federal Court, as part of Malaysian law, the second category of absolute privilege described by Devlin LJ. In *Lincoln v Daniels* [1962] 1 QB 237, Devlin LJ had stated thus at p 749:

> How, then, is it contended that its proceedings are affected by the absolute privilege enjoyed by the Bench of an Inn? The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. *The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings*. The third category is the most difficult of the three to define. It is based on the authority of *Watson v M'Ewan,* in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor. (Emphasis added.)

[38] Thus, the second category of absolute privilege described by Devlin LJ was, '... everything that is done from the inception of the proceedings onwards and extends to all ... other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings'. In my view, the advertisements, required under the Companies Act 1965 and the applicable procedure under the Companies (Winding-Up) Rules 1972, clearly fall within the ambit of Devlin LJ's second category as documents brought into existence for the purpose of the proceedings, starting from the petition which instituted the winding-up proceedings.

[39] In the present case, the defendants also pleaded the defence of absolute privilege. Having regard to the *ratio decidendi* of the Federal Court's decision in *Savant-Asia*, the first defendant's advertisement of the petition was therefore upon an occasion of absolute privilege. Accordingly, the plaintiff's action in defamation must also fail.

CONCLUSION

[40] For the reasons given, the plaintiff's action against the defendants is dismissed with costs. After hearing counsel for the parties, costs is awarded to the defendants in the sum of RM10,000.

Plaintiff's action dismissed with costs.

Reported by Nabilah Syahida Abdullah Salleh